DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0116
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RUDOLFO NEGRETE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800427

The Honorable Andrew W. Gould, Presiding Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Rudolfo Negrete ("Defendant") appeals from his conviction and sentence for molestation of a child, a violation of A.R.S. § 13-1410 and a class two felony. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant was indicted for one count of sexual conduct with a minor pursuant to A.R.S. § 13-1405, one count of kidnapping pursuant to A.R.S. § 13-1304, and one count of custodial interference pursuant to A.R.S. § 13-1302. The sexual conduct with a minor count arose out of events occurring on or about February 2008; the other counts arose out of events occurring on or about March 10, 2008.

¶3 At trial, the victim, then fourteen years old, testified that she first met thirty-eight-year-old Defendant in her hometown of Yuma, Arizona, in July 2007. She told Defendant that she was thirteen years old. Soon after their initial meeting, Defendant and the victim began talking on the phone. In August 2007, the victim would call and talk to Defendant almost every day. After the first week of September 2007, however, the victim stopped calling Defendant because another female, apparently calling on Defendant's behalf, told her to stop.

¶4 In November 2007, on the day before Thanksgiving, the victim saw Defendant in front of his parents' house in Yuma. The victim and Defendant talked, and Defendant put his arms around the victim's waist and kissed her. At Defendant's request, the victim called Defendant that night.

¶5 Thereafter, the victim called and talked to Defendant every day, but did not see him in person until February 2008. During two January 2008 phone calls, Defendant initiated sexual conversations. He also asked the victim whether she would "go stay with him." She said no, but their daily phone conversations continued and in early February 2008, they said that they cared about each other.

¶6 Late one night in February 2008, the victim was talking on the phone to Defendant and "he kept saying he wanted [her] to go over there [to his parents' house]," where he was then staying. The victim "kept saying no" because it was late, she had school the next day, and she would get in trouble if she snuck out. But Defendant "kept asking [her] and asking [her] again," and the victim eventually agreed. The victim left her parents' house through her bedroom window and went to Defendants' parents' house; she and Defendant then went into the room where Defendant was staying. The time was approximately 1:00 or 1:30 a.m.

¶7 In the room, the victim and Defendant started "just talking." Defendant asked the victim whether he could kiss her and she said yes. They started kissing on the lips and Defendant started touching the victim. He put one hand down her pants and "[p]ut his finger inside [her] private part." He then removed her clothes, laid on top of her, and had sexual intercourse with her. After Defendant told the victim that he had ejaculated, the victim lay with Defendant for approximately five minutes before returning to her home.

¶8 Thereafter, the victim and Defendant resumed their daily phone conversations. On March 9, 2008, after having a fight with her father, the victim called Defendant and told him that she wanted to go to live with her uncle in Florida. Defendant said that he did not want her to move so far away and offered to come and get her. The victim accepted his offer and Defendant picked the victim up at approximately 2:00 or 2:30 a.m. and drove her to San Diego, California, where he had a rented bedroom in the basement of a house. The victim stayed there for seven days, during which time she had sex with Defendant three times.

¶9 The State presented evidence that the victim's mother had notified the Yuma County Sheriff's Office that her daughter was missing and the sheriff's office had coordinated with the United States Marshals. On March 18, 2008, United States

Marshals arrested Defendant at his place of work in San Diego and located the victim at the San Diego residence. The victim was transported back to Yuma, where she was interviewed by a criminal investigator and examined by a forensic nurse for sexual assault. The nurse observed "hickeys" – contusions caused by sucking – on the victim's neck and around her breasts. A vaginal exam revealed no internal injuries, no semen or motile sperm, and was inconclusive regarding whether the victim had engaged in sexual intercourse.

¶10 Defendant did not testify on his own behalf, but presented the testimony of his mother and his sister. His mother testified that Defendant did not live at her house but had stayed there the night on which the victim alleged she had sexual intercourse with Defendant for the first time. Defendant's mother testified that during that night she was cleaning her house and did not go to sleep, and she observed Defendant sleeping on a sofa. She did not see anyone enter the house, and all of the house's external and internal doors were bolt-locked shut. Defendant's sister testified that the doors to the house are usually locked.

¶11 After all evidence had been presented, the superior court, citing *State v. Ortega*, 220 Ariz. 320, 206 P.3d 769 (App. 2008), determined that a jury instruction on molestation of a

child was appropriate as a lesser-included offense of sexual conduct with a minor. The jury was instructed accordingly.

¶12 The jury found Defendant not guilty of sexual conduct with a minor but guilty of molestation of a child. The jury also found Defendant guilty of custodial interference but not guilty of kidnapping or its lesser-included offenses. Defendant was sentenced to concurrent presumptive terms of seventeen years of imprisonment for the molestation offense and three and a half years of imprisonment for the custodial interference offense.

¶13 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (Supp. 2009).

STANDARD OF REVIEW

¶14 Where, as here, a criminal defendant neither requested that the jury be instructed on a lesser-included offense of the charged offense nor objected to the absence of such an instruction at trial, we review only for fundamental error. *State v. Bearup*, 221 Ariz. 163, 168, ¶ 22, 211 P.3d 684, 689 (2009). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005)

(internal quotation marks omitted) (citations omitted). It is the defendant's burden to establish both that fundamental error exists and that it caused him prejudice. *Id.* at ¶ 20.

DISCUSSION

¶15 Defendant's sole argument on appeal is that the superior court committed fundamental error because it did not *sua sponte* instruct the jury on contributing to the delinquency of a minor as a lesser-included offense of molestation of a child.

¶16 Pursuant to A.R.S. § 13-1410(A) (Supp. 2009),[1] "[a] person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age." "Sexual contact" is defined as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." A.R.S. § 13-1401(2). Pursuant to A.R.S. § 13-3613(A), a person contributes to the delinquency of a minor when he, "by any act, causes, encourages or contributes to the . . . delinquency of a child." "Delinquency" is defined

[1] We cite to the current version of statutes when no revisions material to this decision have since occurred.

as "any act that tends to debase or injure the morals, health or welfare of a child." A.R.S. § 13-3612(1) (Supp. 2009).

¶17 Because "a person who molests a child necessarily performs an act which 'tends to debase or injure the morals, health or welfare of a child,'" contributing to the delinquency of a minor is a lesser-included offense of molestation of a child. *State v. Sutton*, 104 Ariz. 317, 318-19, 452 P.2d 110, 111-12 (1969) (citation omitted). But a jury instruction on a lesser-included offense is not automatically required in every case. It is required only when the lesser-included offense is "necessarily-included" – i.e., when the evidence is sufficient to support giving the instruction. *State v. Wall*, 212 Ariz. 1, 3, ¶ 14, 126 P.3d 148, 150 (2006). The evidence is sufficient when a rational jury could "find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* at 4, ¶ 18, 126 P.3d at 151 (citation omitted). "It is not enough that, as a theoretical matter, 'the jury might simply disbelieve the state's evidence on one element of the crime' because this 'would require instructions on all offenses theoretically included' in every charged offense." *Id.* (citation omitted).

¶18 Defendant contends that the evidence at trial was sufficient to support an instruction on contributing to the

delinquency of a minor. Defendant argues that a rational jury could have accepted portions of the victim's testimony and portions of "the defense theory" and thereby concluded that on the relevant date,[2] Defendant did interact with the victim, but in a way that constituted only contributing to the delinquency of a minor and not molestation of a child.

¶19 When the evidence creates a factual dispute, there may be sufficient evidence to require a jury instruction on a lesser-included offense. *See State v. Dugan*, 125 Ariz. 194, 195-96, 608 P.2d 771, 772-73 (1980) (when the defendant asserted a mere presence defense, jury could have believed part of the defendant's story and part of the victim's story and concluded that the defendant was guilty of theft but not robbery); *Wall*, 212 Ariz. at 2-3, 6, ¶¶ 2-5, 31, 126 P.3d at 149-50, 153 (same). Our supreme court has recognized that even when a defendant asserts an all-or-nothing defense, it is not impossible for such a factual dispute to arise. *Wall*, 212 Ariz. at 6, ¶ 28, 126 P.3d at 153. But the court has also recognized the infrequency of that situation:

> As a practical matter, when a defendant asserts an all-or-nothing defense such as alibi or mistaken identity, there will "usually [be] little evidence on

[2] The sexual conduct with a minor count was expressly limited to "February 2008" events, and did not include any March 2008 events in San Diego. Defendant does not dispute that the pertinent February 2008 events are those which transpired on the night the parties allegedly had intercourse for the first time.

> the record to support an instruction on the lesser included offenses." In the typical case, the defendant "produces evidence that he simply did not commit the offense and the state produces evidence that he committed the offense as charged." Thus, "the record is such that [the] defendant is either guilty of the crime charged or not guilty."

Id. at ¶ 29, 126 P.3d at 153 (first alteration in original) (citations omitted). For example, in *Bearup* the evidence and the defendant's defense that he was not present for the kidnapping of the victim did not create a factual dispute that required a jury instruction on the lesser-included offense of unlawful imprisonment. 221 Ariz. at 169, ¶ 27, 211 P.3d at 690. In *Bearup*, the jury could either have found that the defendant was guilty or not guilty of kidnapping – there was no evidence from which the jury could have found that he was not guilty of kidnapping but guilty of unlawful imprisonment. *Id.*

¶20 Here, Defendant asserted an all-or-nothing alibi defense. In closing argument, defense counsel relied on Defendant's mother's testimony that she saw Defendant asleep on the sofa and did not see anyone enter the house. The victim testified, however, that in response to Defendant's repeated requests she went to Defendant's parents' house at approximately 1:00 or 1:30 a.m. and Defendant kissed her, put his finger in her vagina, undressed her, and had sexual intercourse with her.

¶21 The evidence did not create a factual dispute from which the jury could conclude that the victim went to the house

and Defendant then committed some act that tended to debase or injure the victim's morals, health or welfare but did not constitute molestation. On appeal, Defendant proposes that the victim might have gone to the house and he then merely might have talked to her about sex or running away, or might have engaged in intimacies with her that fell short of sexual contact. He argues that his theory is supported by the fact that the victim later ran away with Defendant, and by the fact that an "examination of [the victim] by a forensic nurse provided no conclusive proof of her having previously had sexual intercourse." But no evidence was presented that in February 2008 Defendant talked with the victim about running away or engaged in any other detrimental conduct short of molestation. Though the victim testified that on the relevant date she talked to Defendant on the phone and later in person at his parents' house, she did not testify as to the contents of their conversations. And even if the jury found that there was no conclusive proof that the victim had ever had vaginal sexual intercourse, the offense of molestation of a child does not require intercourse. *See* A.R.S. §§ 13–1401, -1410 (Supp. 2009).

¶22 Based solely on the evidence that Defendant induced the victim to leave her house and go to his parents' house at 1:00 or 1:30 a.m., the jury could have found that Defendant was guilty only of contributing to the delinquency of a minor even

if it disbelieved the victim's testimony that she engaged in sexual contact with Defendant once at the house. Contributing to the delinquency of a minor is a very broadly-drawn offense, and the act of inducing a minor to sneak out of her parents' house during early morning hours could, at least in some circumstances, be found by a jury to satisfy its elements. *See* A.R.S. §§ 13-3612 (Supp. 2009), -3613; *State v. Hixson*, 16 Ariz. App. 251, 253, 492 P.2d 747, 749 (1972) ("[W]hether or not, under the particular circumstances, the act falls within the statutory prohibition is a question for the trier of fact."); *cf. State v. Cutshaw*, 7 Ariz. App. 210, 221, 437 P.2d 962, 973 (1968) (encouraging a child to run away from her parents may endanger her morals or health), *superseded on other grounds by*, Ariz. R. Crim. P. 15, *as recognized in State v. Bailey*, 125 Ariz. 263, 609 P.2d 78 (App. 1980).

¶23 While a delinquency instruction could properly have been given on this ground had it been requested, we do not find that here the court's failure to give the instruction *sua sponte* rises to the level of fundamental error. The failure of the court to glean from the evidence every possible unarticulated theory that might be helpful to the defense does not constitute "error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (internal quotation marks omitted) (citations

omitted). The absence of the instruction did not go to the foundation of the case or deprive Defendant of a fair trial, and it did not deprive Defendant of a right essential to his alibi defense. Further, in view of the jury's implicit finding that sexual contact occurred we do not find that Defendant has sufficiently demonstrated that the absence of the instruction caused prejudice.

CONCLUSION

¶24 For the reasons set forth above, we affirm.

/S/

PETER B. SWANN, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

DANIEL A. BARKER, Judge